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No. 92-517

In the Supreme Court of the United States

OCTOBER TERM, 1992

HUBERT PAYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly applied Rule 801(d)(2)(E), Fed. R. Evid., to admit statements made by petitioner's co-conspirators during and in furtherance of the conspiracy.

2. Whether the district court properly placed on petitioner the burden of proving that he withdrew from the conspiracy.

3. Whether the district court committed clear error in ruling at sentencing that petitioner had not accepted responsibility for and did not have a minimal role in the offense.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A26-A52) is reported at 962 F.2d 1228.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1992. A petition for rehearing was denied on June 22, 1992 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on September 21, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of conspiring to launder drug proceeds

(18 U.S.C. 1956) and to avoid currency reporting requirements (31 U.S.C. 5324), in violation of 18 U.S.C. 371. The district court sentenced petitioner to 46 months' imprisonment, to be followed by two years' supervised release, and fined petitioner $25,000. The court of appeals affirmed. Pet. App. A26-A52.

1. The evidence at trial showed that petitioner agreed to launder drug proceeds. The investigation leading to petitioner's arrest and conviction began in 1988 when the Internal Revenue Service (IRS) received information that Frank Coyle, a Cleveland stockbroker, and John McCurley, a drug dealer, were engaged in money laundering. The IRS commenced an undercover investigation that also implicated Val King, who offered to convert cash into checks through two attorneys. An undercover IRS agent gave the two attorneys $50,000 in putative drug proceeds, but the attorneys encountered difficulty in laundering the money. Pet. App. A27-A28.

Frank Coyle testified at trial that sometime shortly before March 20, 1989, he and King discussed the problems they had encountered in laundering the cash. On March 23, 1989, in a meeting that the IRS secretly recorded, King and Coyle acknowledged to the undercover IRS agent that the attorneys' efforts to launder the drug proceeds had been a "disaster" and "embarrassing," but King assured the agent that he had a friend—petitioner—who could launder cash successfully in 10 to 14 days. Pet. App. A29-A30.

On March 31, 1989, in another secretly recorded meeting, the undercover IRS agent met with Coyle, King, and petitioner. The agent made clear that he wished to launder drug proceeds, and petitioner

assured the agent that he could successfully launder the cash by passing the money through a business established for that purpose. At the close of the meeting, petitioner gave the agent a business card bearing his and King's home phone numbers. Pet. App. A30-A31.

On April 12, 1989, the undercover agent met King in a hotel room and gave him $25,000 to launder. King called petitioner from the hotel room and drove immediately from the meeting to petitioner's residence. On April 18, 1989, petitioner gave Coyle a $25,000 check drawn on the account of a company called Investors Unlimited and made payable to the undercover agent's fictitious company. The Investors Unlimited account had been opened on April 11, 1989, and the money deposited into it had come from a series of local bank checks purchased with cash in amounts of less than $10,000. Pet. App. A31-A32.

Petitioner testified in his own defense. He acknowledged meeting with the undercover IRS agent on March 31, 1989, to discuss laundering drug proceeds. According to petitioner, however, he never intended to launder the money. Petitioner claimed that he withdrew from any conspiracy following the meeting, when he informed King that laundering the money was crazy and not in their best interest. Petitioner conceded, however, that he did not contact the authorities or do anything to stop the money laundering activity. Pet. App. A32-A33.

2. The district court instructed the jury that to convict petitioner of conspiracy the government must prove three elements beyond a reasonable doubt:

> First, that two or more persons conspired, or agreed, to commit the crime of laundering money instruments or structuring transactions to evade the bank reporting requirements. Second, that [petitioner] knowingly and voluntarily joined the conspiracy. And third, that a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.

C.A. App. 966. After detailing the government's burden of proof with respect to those three elements, the court instructed the jury that petitioner had "raised the defense that he withdrew from the agreement before any overt act was committed." *Id.* at 975.

The court explained that "[w]ithdrawal can be a defense to a conspiracy charge," but petitioner "has the burden of proving to you that he did in fact withdraw." C.A. App. 975. Moreover, the court instructed that the withdrawal must have occurred "before any member of the group committed one of the overt acts described in the indictment." *Id.* at 976. The court reminded the jury that "[t]he fact that [petitioner] has raised this defense does not relieve the Government of its burden of proving that there was an agreement, that [petitioner] knowingly and voluntarily joined it, and that an overt act was committed." *Ibid.*

After the jury convicted petitioner of conspiracy, the district court sentenced him under the Sentencing Guidelines to a 46-month prison term. In setting petitioner's Guidelines sentencing range, the

court made two determinations that petitioner challenged on appeal. First, the court denied petitioner credit for acceptance of responsibility (Guidelines § 3E1.1), finding that he had testified untruthfully regarding the crime for which he was convicted, and therefore had not accepted responsibility for it. See Pet. App. A51. Second, the court denied petitioner a reduction for having a minimal role in the offense (Guidelines § 3B1.1). See Pet. App. A51-A52.

3. The court of appeals affirmed petitioner's conspiracy conviction and sentence. Pet. App. A26-A52. Of particular relevance here, the court of appeals held that the district court: (a) properly admitted statements made by petitioner's co-conspirators, *id.* at A43-A46; (b) properly instructed the jury that petitioner had the burden of proving he withdrew from the conspiracy, *id.* at A46-A47; and (c) did not commit clear error in making its sentencing determinations, *id.* at A50-A52.

ARGUMENT

1. Petitioner presents a series of arguments (Pet. 27-40) challenging the district court's admission of statements made by petitioner's co-conspirators during and in furtherance of the conspiracy. Those arguments are without merit. Co-conspirator statements are admissible under Rule 801(d)(2)(E), Fed. R. Evid., if the district court finds by a preponderance of the evidence that a conspiracy existed and that the defendant participated in it. See *Bourjaily* v. *United States*, 483 U.S. 171, 181 (1987). Ample evidence existed in this case to support the admission of co-conspirator statements against petitioner. Admitting such statements did not violate petitioner's rights

under the Sixth Amendment's Confrontation Clause. See *Bourjaily*, 483 U.S. at 181-184 (following *United States* v. *Inadi*, 475 U.S. 387 (1986)).

Specifically, the court properly admitted statements made by co-conspirator King to co-conspirator Coyle and the undercover IRS agent concerning petitioner's involvement in the conspiracy prior to the March 31, 1989, meeting. Those statements closely parallel the co-conspirator statements that this Court's *Bourjaily* decision had declared admissible. In *Bourjaily*, co-conspirator Lonardo stated that he was involved in drug dealing with a "friend" and "[t]he friend, who turned out to be petitioner, showed up at the prearranged spot at the prearranged time." 483 U.S. at 180-181. This Court held that "[t]he courts below properly considered the statements of Lonardo and the subsequent events in finding that the Government had established by a preponderance of the evidence that Lonardo was involved in a conspiracy with petitioner." *Id.* at 181. Similarly, King's statements to Coyle and the undercover IRS agent concerning petitioner's membership in the conspiracy were confirmed by petitioner's "own admissions made on March 31, 1989" when he participated in the meeting that King had arranged. Pet. App. A44.

The court also properly admitted co-conspirator statements regarding the laundering of the undercover IRS agent's original $50,000. Notwithstanding petitioner's claim that he was not involved in that original transaction, the prior co-conspirator statements were admissible against him because he

subsequently joined the money laundering conspiracy. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 393 (1948) ("With the conspiracy thus fully established, the declarations and acts of the various members, even though made or done prior to the adherence of some to the conspiracy, become admissible against all as declarations or acts of co-conspirators in aid of the conspiracy."). See generally 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 801(d)(2)(E), at 801-337 (1992) ("a statement of a co-conspirator is admissible against all other conspirators, including those who joined after the statement was made") (citing cases). Petitioner's contention that the original $50,000 was laundered pursuant to a separate conspiracy is inconsistent with the proof at trial. As the indictment charged, the attempts to launder the $50,000 and the $25,000 were part of a single conspiracy involving the continuing participation of conspirators King and Coyle.[1]

2. Petitioner also challenges (Pet. 40-56) the district court's instructions to the jury that petitioner bore the burden of proving he withdrew from the conspiracy. The courts below correctly recog-

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[1] The issue whether the proof establishes a single conspiracy or multiple conspiracies requires a "factual determination." *United States* v. *Broce*, 488 U.S. 563, 569 (1989). The court of appeals correctly found that petitioner's rights were fully protected by instructions that the jury should not consider co-conspirator statements with respect to petitioner if the jury found they related to a separate conspiracy. Pet. App. 45-46; cf. *Yates* v. *Evatt*, 111 S. Ct. 1884, 1893 (1991) (describing the "sound presumption of appellate practice" that "jurors are reasonable and generally follow the instructions they are given").

nized that, while the government has the burden of proving beyond reasonable doubt every element of the conspiracy offense, a defendant seeking to avoid criminal liability has the burden of proving the affirmative defense that he withdrew from the conspiracy.

A withdrawal defense requires not only that a defendant have ceased participating in the conspiracy, but also that he either have disclosed the conspiracy to the authorities or at least have done some "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464 (1978). Even if the defense is established, it does not excuse the defendant from criminal responsibility for his prior conspiratorial acts, but instead simply serves as a foundation for other defenses, such as a statute of limitations claim. See, *e.g.*, *United States Gypsum Co.*, 438 U.S. at 465 n.38.[2]

This Court has long held that a defendant who claims that he withdrew from the conspiracy must show some "affirmative action" constituting withdrawal. *Hyde* v. *United States*, 225 U.S. 347, 369 (1912). In *Hyde*, the Court ruled that a defendant's

[2] See also *United States* v. *Read*, 658 F.2d 1225, 1232-1233 (7th Cir. 1981) (withdrawing "defendant is still liable" for prior conspiratorial acts and withdrawal "becomes a complete defense only when coupled with the defense of the statute of limitations"); cf. Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 957 (1959) ("in those jurisdictions which have overt-act requirements, the defendant is not punishable as a member of the conspiracy if he withdraws before an overt act is committed").

participation in a conspiracy continues whether or not he performs acts in furtherance of the conspiracy and that "until he does some act to disavow or defeat the purpose he is in no situation" to assert a withdrawal defense. *Ibid.* In accordance with *Hyde*, the overwhelming majority of federal courts of appeals have held that a defendant bears the burden of proving his withdrawal from a conspiracy.[3]

The Seventh Circuit departed from that line of authority in *United States* v. *Read*, 658 F.2d 1225 (1981). That court construed *Hyde* as deciding only who bears the burden of production rather than the burden of proof, and it declined to follow prior Seventh Circuit cases placing on defendants the burden of proving withdrawal. 658 F.2d at 1234-1236. See, *e.g.*, *United States* v. *Dorn*, 561 F.2d 1252, 1256 (7th Cir. 1977). The court reasoned that the Due Process Clause requires the government to "disprove the defense of withdrawal beyond a reasonable doubt," because with-drawal "directly negates the element of membership in the conspiracy during the period of the statute of limitations." 658 F.2d at 1233. The court

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[3] See, *e.g.*, *United States* v. *Dyer*, 821 F.2d 35, 39 & n.6 (1st Cir. 1987); *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964) (Friendly, J.), cert. denied, 379 U.S. 960 (1965); *United States* v. *Gillen*, 599 F.2d 541, 548 (3d Cir.), cert. denied, 444 U.S. 866 (1979); *United States* v. *Branch*, 850 F.2d 1080, 1082-1083 (5th Cir. 1988), cert. denied, 488 U.S. 1018 (1989); *United States* v. *Lash*, 937 F.2d 1077, 1083 (6th Cir.), cert. denied, 112 S. Ct. 397 (1991); *United States* v. *Granados*, 962 F.2d 767, 773 (8th Cir. 1992); *United States* v. *Russell*, 963 F.2d 1320, 1323 (10th Cir.), cert. denied, 113 S. Ct. 280 (1992); *United States* v. *Finestone*, 816 F.2d 583, 589 (11th Cir.), cert. denied, 484 U.S. 948 (1987).

left intact, however, the rule that "the burden of going forward with evidence of withdrawal * * * remains on the defendant." *Id.* at 1236.[4]

Since the Seventh Circuit's decision in *Read*, this Court has decided cases undermining *Read*'s suggestion that the Due Process Clause forbids placing the burden of proving withdrawal on a defendant. For example, in *Martin* v. *Ohio*, 480 U.S. 228 (1987), this

[4] Petitioner also cites First and Third Circuit opinions purportedly supporting his position. But while the First Circuit in *United States* v. *Piva*, 870 F.2d 753, 756-757 (1st Cir. 1989), cert. denied, 494 U.S. 1016 (1990), quoted a district court jury instruction placing the burden on the government to negate withdrawal, the cor-rectness of that instruction was not at issue and not challenged by the government on appeal. The First Circuit's position is thus more accurately determined from *United States* v. *Dyer*, *supra*, in which the court upheld a challenged instruction that the government bears the burden of proving the essential elements of conspiracy, but that "if the defendant contends he withdrew or was abandoned from the conspiracy, the burden shifts to the defendant to demonstrate that" defense. 821 F.2d at 39 & n.6. Similarly, the Third Circuit has not abandoned its holdings that "the burden of establishing withdrawal lies on the defendant." *United States* v. *Heckman*, 479 F.2d 726, 729 (3d Cir. 1973) (quoting *Borelli*, 336 F.2d at 388). See *Gillen*, 599 F.2d at 548. The cases cited by petitioner recognize that a defendant presenting prima facie evidence of withdrawal is entitled to acquittal if that evidence is uncontradicted. See, *e.g.*, *United States* v. *Jannotti*, 729 F.2d 213, 221 (3d Cir.), cert. denied, 469 U.S. 880 (1984); *United States* v. *Steele*, 685 F.2d 793, 803-804 (3d Cir.), cert. denied, 459 U.S. 908 (1982). The Ninth Circuit recently cited *Read* approvingly in a mail and wire fraud case, but the case did not involve a conspiracy charge and the statements are accordingly dicta as to the issue presented here. *United States* v. *Lothian*, No. 90-50269 (9th Cir. Oct. 5, 1992), slip op. 11960.

Court held that a State does not violate due process by requiring a murder defendant to bear the burden of proving self-defense. And in *Medina* v. *California*, 112 S. Ct. 2572 (1992), the Court ruled that a State may constitutionally require the defendant to bear the burden of proving incompetence. As with those other defenses, requiring a defendant to establish withdrawal does not "offend[] [any] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 2577 (internal quotation marks omitted).[5]

Not only have decisions of this Court undermined *Read*'s rationale, but the Seventh Circuit itself has called that decision into question. The Seventh Circuit stated in a case decided after *Read* that "the burden of [establishing] withdrawal lies on the defendant." *United States* v. *Patel*, 879 F.2d 292, 294 (7th Cir. 1989) (Posner, J.) (quoting Judge Friendly's opinion in *Borelli*, 336 F.2d at 388). But see *United States* v. *Rossy*, 953 F.2d 321, 325 (7th Cir.) (following *Read*), cert. denied, 112 S. Ct. 1240 (1992). Given the continuing intra-circuit conflict on that issue, the

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[5] Under the common law, petitioner would not have been able to raise his withdrawal defense at all, because the crime of conspiracy was complete without proof of an overt act. See *Hyde* v. *United States*, 225 U.S. at 359; see generally R. Perkins & R. Boyce, *Criminal Law* 685 (1982) ("At common law guilt of conspiracy was incurred by the combination for a forbidden purpose, and no additional 'overt act' was required for conviction — which is still the law where unchanged by statute.") (footnotes omitted). Indeed, unlike 18 U.S.C. 371, which expressly requires an overt act, other federal statutes punish simply the illicit agreement itself. See, *e.g.*, 21 U.S.C. 846, 963 (drug conspiracy statutes); 15 U.S.C. 1 (Sherman Act).

Seventh Circuit may be persuaded to reconsider the issue en banc. If the Seventh Circuit follows the decisions of the other circuits, it would eliminate any need for review by this Court.

Even if this Court concludes that the Seventh Circuit is committed to its position in *Read* and that the circuit conflict is likely to persist, this case is not an appropriate vehicle for resolving the conflict. Petitioner asserts that he withdrew from the conspiracy immediately after the March 31, 1989, meeting. That purported withdrawal, however, came too late to absolve him of guilt. At the time of that meeting, petitioners' co-conspirators had already reached an agreement to launder drug proceeds, and they had committed numerous overt acts in furtherance of the conspiracy. Once petitioner joined the conspiracy, he became criminally liable on the conspiracy charge—even if he subsequently withdrew from the plan. Petitioner's "purported withdrawal after overt acts had been performed came too late to provide a defense to a charge of conspiracy." *United States* v. *Loya*, 807 F.2d 1483, 1493 (9th Cir. 1987).[6]

Furthermore, shifting the burden of proof would not alter the result in this case, because petitioner's

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[6] See, *e.g.*, *Read*, 658 F.2d at 1230 ("Each conspirator is liable for overt acts of every other conspirator done in furtherance of the conspiracy, whether the acts occurred before or after he joined the conspiracy."). See also Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 946 (1959) (defendants joining conspiracy are liable for prior overt acts). Indeed, at the meeting itself, petitioner personally committed an overt act in furtherance of the conspiracy when he gave the IRS agent a business card bearing his and King's home phone numbers. See Pet. App. A30-A31.

evidence of withdrawal was so insubstantial that any error in assigning the burden of proof would have been harmless. Petitioner's only evidence of withdrawal was his own uncorroborated testimony that he told King after the March 31, 1989, meeting that laundering the IRS agent's money was crazy and not in their best interest. Pet. App. A33. Some two weeks later, however, when King received $25,000 from the IRS agent, King immediately telephoned petitioner and went to petitioner's residence with the money. *Id.* at A31. Indeed, on appeal, petitioner characterized his defense as being that he never joined the conspiracy—a theory that the jury rejected. See Pet. C.A. Reply Br. 11.[7]

3. Finally, the court of appeals correctly held that the district court committed no clear error in sentencing when it denied petitioner a credit for

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[7] The relevant passage from petitioner's reply brief explained his trial defense as follows: "[Petitioner] never testified [that] he withdrew from any conspiracy. What his evidence showed was that no conspiracy including him was ever formed." C.A. Reply Br. 11. Petitioner went on to explain that, "to the extent it can be said that an agreement was reached on March 31, 1989," petitioner withdrew before any subsequent overt acts. *Ibid.* See also Pet. 18 (petitioner was simply "acting out a scenario" rather than actually joining the conspiracy at the March 31, 1989 meeting). Under the trial court's instructions, the government was required to prove beyond a reasonable doubt that petitioner "knowingly and voluntarily joined the conspiracy." See C.A. App. 966. Thus, the jury rejected petitioner's primary defense that he had not joined the scheme. See also *id.* at 969 ("proof that a defendant simply knew about a conspiracy, or was present at times, or associated with members of the group, is not enough, even if he approved of what was happening or did not object to it").

acceptance of responsibility (Guidelines § 3E1.1) and a reduction for having a minimal role in the offense (Guidelines § 3B1.1). Pet. App. A51-A52. The government submitted ample evidence rebutting petitioner's claimed withdrawal and demonstrating instead that he was a central figure in the conspiracy. There is no merit to petitioner's suggestion that his acquittal on the substantive money laundering offense represents a jury finding that he did in fact withdraw from the conspiracy. See *United States* v. *Watford*, 894 F.2d 665, 670-671 (4th Cir. 1990) (even though jury acquitted defendant of later substantive offense, district court properly found for sentencing purposes that defendant did not withdraw from conspiracy). Instead, the jury verdicts may simply have been the result of lenity or compromise. See *United States* v. *Powell*, 469 U.S. 57, 65 (1984). Given the overwhelming evidence demonstrating that petitioner's role in the conspiracy was far greater than he claimed, the district court properly denied him credit for acceptance of responsibility and a reduction for having a minimal role in the offense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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